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JEANNE HICKS, Clerk
BY Deputy

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

THE STATE OF ARIZONA,

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

No. CR 2008-1339

BEFORE: THE HONORABLE WARREN R. DARROW
JUDGE PRO TEMPORE OF THE SUPERIOR COURT
DIVISION SIX
YAVAPAI COUNTY, ARIZONA

PRESCOTT, ARIZONA
THURSDAY, SEPTEMBER 9, 2010
8:34 A.M.

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

MOTION IN LIMINE RE ANONYMOUS E-MAIL

ROXANNE E. TARN, CR
Certified Court Reporter
Certificate No. 50808

SEPTEMBER 9, 2010
8:34 A.M.

MOTION IN LIMINE RE ANONYMOUS E-MAIL

APPEARANCES:
FOR THE STATE: MR. JOE BUTNER AND MR. JEFF PAUPORE.
FOR THE DEFENDANT: MR. JOHN SEARS, MR. LARRY HAMMOND AND MS. ANNE CHAPMAN.

(Whereupon, the following was held in open court out of the presence of the jury.)

THE COURT: On the record in the State versus Steven Carol DeMocker, and the defendant and all five attorneys are present. The jury is not present.

There were legal matters we were going to discuss at 8:30, and I want to take those up now. I want to start with the anonymous e-mail.

First, I want to note, last night I was reading transcripts, and contrary to what appears in the briefs, Judge Lindberg made a very clear ruling on this issue. On June 3rd, Page 174 of the transcript, I took another look at the case law having to do with the e-mail. I'll assume, and I am still satisfied that my former ruling is correct. So I am not going to reconsider the former ruling in light of the *Machado* case. So contrary to what was in the memo, there was a final ruling. And I discovered that last night for the second time. I am sure I went through an

index. I saw it in the volume. I focused on the argument part, which was a number of pages of transcript.

So that changes, in my mind, the type of analysis, and I have explained this before. I am not going to reconsider discretionary rulings by Judge Lindberg. I am not going to do that. But if I think there is a legal error, I have an obligation to correct that.

And I have already indicated in my review of the law, I think the law is contrary to that ruling. And I am going to allow five minutes of argument on this point, and, Mr. Butner, it is actually your motion. It is a motion in limine that we are hearing, so you may proceed.

MR. BUTNER: Thank you, Judge.

First of all, I think that it is very clear if you look at this e-mail that, first of all, it is -- basically, there is no argument by either side. It is hearsay, pure hearsay. And Judge Lindberg very carefully asked that a number of times of the parties, and there was never any disagreement on that issue. So we have a hearsay e-mail.

The second thing that jumps out about this particular e-mail, it is from anonymous anonymous. Who is anonymous anonymous? We have no idea who anonymous anonymous is. And anonymous anonymous in that e-mail -- so we don't know who the declarant is. We have no idea who the

declarant is. And the declarant doesn't say any kind of indication who they are. They say basically someone else did it. They don't say, "I did it." They don't say "DeMocker did it." They say "someone else did it, and here's who they are," they don't name them. They just describe, basically, a class of persons, these drug dealer people that came up and did this. So we don't have a declarant who makes a statement against interest.

That is the biggest difference between *Machado*. And then if you look at the *Holmes* decision, this is another declarant, who we know who the declarant is who is making statements to people. This is the U.S. Supreme Court case, and it talks about third party culpability. Again, huge difference. So what we have here is complete anonymous unreliability with no statement against interest.

Now, the defense has made the argument that somehow this wasn't investigated adequately by the State, or that this was evidence by a myopic focus by the State on Mr. DeMocker and not on anybody else, and not Mr. Knapp. Well, that is simply not true.

The fact of the matter is when this e-mail came in, it was investigated. It was investigated down to the Internet cafe down in Phoenix, and we could go no further at that point in time. The defense had held onto this e-mail just long enough, and I am not saying it was

intentional on their part, but just long enough that there was no longer any video surveillance available to be followed up on. The way that the e-mail was sent precluded any further follow-up. In fact, it was a bit of sound investigation and good luck that we even got to the place where the Internet cafe is the location where the e-mail was sent from. Beyond that, we can't go any further.

Judge, the case law in this instance -- in fact, if you look at the case law, it basically says that this e-mail shouldn't come in, because it is mere speculation about somebody else and nothing to lend any kind of credibility or corroboration to it and nothing to lend any reliability to it.

The State would ask that it be precluded on those grounds.

Thank you.

THE COURT: Thank you.

Mr. Sears.

MR. SEARS: Your Honor, this is not, in our view, a pure question of law, and is not, we think, subject under Rule 16.1(d) to analysis as to whether Judge Lindberg made a mistake of law in denying the State's motion. It is really a question of applying the law, which is not in dispute, to the particular piece of evidence at issue in this case.

Remember that *Machado* tells us that the reliability standard for purposes of this analysis is not a mechanistic -- or I think they used the word "mechalistic" or something like that -- application of the hearsay rules, which is what created the problem in the *Chambers* case.

The standard, which is very clear and which is the law in this state, is that no reasonable person could conclude based on corroborating and contradictory evidence that the statements could be true. That comes from *Machado*. The case law in *Machado* and *Gibson* say that the proposed evidence of third party culpability only needs to tend to cast doubt. It doesn't have to be proved beyond a reasonable doubt. This is a Sixth Amendment issue for the defendant. This is not the State's burden to prove somebody guilty. The State seems to be confused about that.

It is subject to a 403 analysis. We have pointed in our moving papers, twice now, how the 403 analysis really falls in favor of admitting the evidence, because as the State often says, the evidence is prejudicial, but it is only prejudicial to one side. In this case, it is only prejudicial to the State's case against this defendant.

Machado affirmed *Gibson*. It says that the evidence must be sufficiently relevant that it tends to create a reasonable doubt as to the defendant's guilt. That is the tendency language that I was just referring to. That

comes from *Machado* affirming *Gibson*.

I think I may have mentioned -- I can't remember -- I probably mentioned in the June 3rd argument to Judge Lindberg, that I have had some extensive briefing experience in federal court on this very topic, and on the relationship of *Gibson* to the line of cases beginning in 1978 with *Fulminante*. *Fulminante*, erroneously, as the *Gibson* court pointed out, placed additional burdens on a defendant's Sixth Amendment right to present a defense, particularly a third party culpability case. The question in my case was whether *Gibson* represented a change in the law or whether it just explained *Fulminante*. Ultimately the 9th Circuit held that it just explained *Fulminante*, and that the law in Arizona had always been what *Gibson* said it was in this case.

The point is, in *Machado*, the analysis of the anonymous phone call, which is what the State spent all of its pleading analyzing, was relatively straight forward. It was a statement against interest, and it was admissible as a hearsay exception on that basis. That is not what we are talking about here, but the State is mistaken, I think, in saying that the inability of the defense in this case to point to an exception to the hearsay law precludes, as a matter of law, this anonymous e-mail.

The standard is not a mechanistic application of Rule 804 on hearsay. It is what I just said,

which is no reasonable person could conclude that the statements could be true. That is what the law is in Arizona. It is not a requirement under *Machado* or *Gibson* or *Holmes versus South Carolina*, or any other case, that the defendant be able to show that the document in question were, in the case of *Machado* of the telephone call, were admissible on its face. It simply has to be something that could be considered that would tend to fast out on the defendant's guilt.

Stepping back and looking at this case, which is what we really think Judge Lindberg did in this case, and looking at the anonymous e-mail, which he had in front of him, Your Honor, it is reasonable to conclude that when he made his decision, he understood that there was no clear hearsay exception that would apply in this case.

THE COURT: I have got to stop you right there, Mr. Sears.

Isn't it in the transcript that Judge Lindberg indicated that he did not need to see the e-mail and the report? I think you indicated that he had the e-mail in front of him. Did he? It didn't seem to indicate that in the transcript to me when I looked over it.

MR. SEARS: I would have to review, Your Honor. I am not sure.

If he didn't have the e-mail, it was

certainly paraphrased in a number of our motions. I can see that it was in the response to the State's motion to reconsider.

The last point I want to make, Your Honor, is the prejudice to the defendant if the Court were to change Judge Lindberg's ruling. That ruling was made on the day trial began. Opening statements followed after that ruling. That was made in the morning.

Ever since then, Knapp and Knapp's behavior and the circumstances of Knapp have been in this case, not only from the defense side, but from the State's side. The State put on yesterday, two witnesses to talk about Knapp.

And the prejudice to the defendant of a ruling change couldn't be more clear than what happened yesterday. Until you sustained the State's objections to my questions about Knapp's prescription drug use, which ties directly to the allegations in the anonymous e-mail, as we have said throughout this, until that point, we did not know that you were going to prevent us, at least for the moment, from going into a topic which clearly relates to the third party culpability defense that the judge said we had a right to present. So, it was logical and obvious and appropriate to ask that witness, who had said a number of times, including under oath in the deposition, that Knapp, a person

she knew better than anyone else, had a prescription drug problem.

That puts the defense in this position mid-trial, Your Honor: If you were to change the ruling and preclude that, then we have had now three-plus-months worth of trial in this case in which Knapp and Knapp's behavior has been raised by both sides so that the jury now knows who he was, where he lived, what he was doing that night, how he died, the circumstances under which he died, and a number of things about his behavior from the time of Carol Kennedy's murder until the time of his death six months later.

A ruling that would preclude this third party culpability defense, which we believed until yesterday was a viable defense for Mr. DeMocker in this case, would prejudice Mr. DeMocker because now we have presented a story which we can't complete to this jury.

That is the harm that a ruling like this would do in this case, and I think that is the reason why Rule 16.1(d) places such a high burden on a judge who would come in and change a decision made.

We don't dispute what you have said here this morning, which is if you see a mistake of law you would be duty bound to correct it. We think that this is not a question of law. We think the law is, as we have outlined it, as Judge Lindberg found it, we think it is a

discretionary ruling as to whether or not the intrinsic reliability from this e-mail, which we have presented to both Judge Lindberg and to you in our pleading about all of the circumstances, make it exactly the kind of evidence that the *Machado* court, the *Gibson* court and the *Holmes* court, the United States Supreme Court, would permit as third party culpability evidence.

That was the change in law that *Gibson* brought about. It changed decades of law, where all of us who practiced in this area, thought it was virtually impossible to raise a third partly culpability defense. *Gibson* and then *Machado*, most recently, make it clear that that would deny this man's Sixth Amendment right to present a defense.

It also makes it pretty clear, as does *Holmes*, that the denial of the right to present defense could be found to be reversible error, and we think that should be in the Court's mind, thinking about whether or not this is a decision that needs to be reversed for the reasons that the State has advanced in this case.

Lindberg denied a motion earlier. The State originally raised this. We noticed this third party culpability defense. The State mistakenly filed a motion under Rule 608 claiming it was character evidence. When Judge Lindberg made that ruling, he denied that ruling. The

State then waited and filed a motion in limine that was, again, denied by the judge.

It is important to note that the next two weeks, the 3rd of June until the 17th of June, the last two weeks that Judge Lindberg was on this case, the State did nothing at all to ask the judge to reconsider that ruling as we began the trial. They waited, I think not coincidentally, until a new judge was appointed and ran the same argument by a new judge to see if it could produce a different result in this case.

Respectfully, we think that the State has offered not one additional fact, not one additional case, not one additional argument that was not presented to Judge Lindberg in this case. I understand that the Court thinks that Judge Lindberg simply never addressed the question of reliability, but I ask you, Your Honor, whether or not you could say today that no reasonable person could conclude after reading that anonymous e-mail that the statements could be true. That is the test. That is simply the test.

It is not proof beyond a reasonable doubt. It is not a mechanistic recital of some exception under 804 to the hearsay rule. It is simply could a reasonable person conclude that the statement could be true, and if you find that, then it has met the threshold test, assuming that we get past the relevance test and the

probative value test.

The State is not contesting in this motion for reconsideration that argument from *Machado*, which is that the evidence must be sufficiently relevant. That is the 401, 402, 403 argument, and the probative value must outweigh the risk that the evidence will prejudice the State or confuse the jury.

Remember the facts of *Machado*. It was an anonymous telephone call. It was never established who made that call. It was simply determined a statement against interest, because it was one person talking about their own conduct. That was the easy analysis that allowed a reversal of the trial court's preclusion of evidence in that case.

Here, we have a layered, detailed e-mail. We know, as Judge Lindberg pointed out, when it was sent, to whom it was sent, and where it was sent from. What we do know is that the person who wanted to be anonymous was successful, at least to this point, in doing that. That is what we know about this case.

The other details that are in that e-mail, the State argues that they were in the public record and somebody could have known them, that goes to the weight. That is really no different, if you think about it, than the way a person defends a charge against themselves. You argue that the inferences from the evidence and the weight of the

evidence are insufficient as a matter of law. That doesn't mean it is not admissible. It doesn't mean that the criminal charge can't be brought in the first instant. It simply goes to the weight and arguments to be made. It is not a basis to deny a person their Sixth Amendment right to present a defense.

The State is confusing concepts like confrontation and burden in this case. The burden on the defendant is simply what *Machado* says it is. It is a very low threshold, relatively speaking, compared to proof beyond a reasonable doubt when a person is being accused of a crime. That is because it is a Sixth Amendment right, Your Honor.

THE COURT: Thank you.

Mr. Butner, I have read the briefs, read the transcripts. I've looked at the cases and other cases, as well. The argument I want you to address, and address what you want -- and Mr. Sears took more than five minutes, and you can have equal time here -- what I want you to address is the prejudice aspect.

There was a ruling. I am the one that announced today it was a final ruling. It was briefed as not quite a final ruling before, but in fact, it was a final ruling. Mr. Sears is now arguing prejudice. I specifically am asking you to address that. I really don't think I can be edified any more about the legal principles involved.

MR. BUTNER: First of all, Judge, in terms of prejudice, the Court rightfully prevented us from mentioning this e-mail in our opening statements. And why was that? That's because it was still on the Court's mind at that point in time. So there has been no prejudice in this case.

The State still had, basically, an obligation and a burden to establish that Mr. Knapp did have an alibi. So we presented evidence about that, and Mr. Knapp's circumstances were investigated. There is no prejudice to the defense in this case.

The real prejudice lies in allowing this highly speculative and potentially confusing e-mail to be presented to the jury as evidence. It is clearly unreliable and doesn't meet the *Machado* standards for reliability, or the standards enunciated in any of the other cases, Judge. So when you do a 403 analysis of this thing, it is because you consider all of those types of factors.

This is unfairly prejudicial. It is unfairly prejudicial to the State in this case. There is just no way that this thing is reliable under any set of circumstances. It can be a piece of manufactured evidence, and can't be followed up on.

THE COURT: So much has gone on in this case that doesn't relate to the substance of the case itself.

With regard to prejudice, I have been

conscious of this outstanding issue, and have raised it and have asked if there are witnesses that might bring it up. Was never told that there would be such witnesses. That is what I was told.

An important issue, one that I wanted to look into and took hours looking into, actually, and for me to feel I have a grasp on it, I think the original ruling was incorrect legally. I am concerned about the prejudice aspect.

There was a ruling made on June 3rd. There was no attempt to challenge that ruling until July 15, technically, at a time when those other matters were going on that really don't relate to the substance and important evidentiary issues in this case. I, sua sponte, indicated that a witness would not be excused yesterday, and therefore, there is no prejudice locked into this at this point, that I can see.

Mr. Sears, on that point only.

MR. SEARS: Thank you.

The prejudice is that notwithstanding the fact that no specific mention of this e-mail has yet entered the courtroom in front of the jury, the story as it unfolds about Knapp, who Knapp was, Knapp's relationship, but primarily the State's failure -- the Court will remember all the testimony about the failure to search Knapp's person,

releasing him the night of the murder, not searching his guesthouse in any meaningful way, and then the fact of his death has already been presented to this jury.

The State wants it both ways. The State says, look, we established he has an alibi, so we don't want to hear any more testimony about Knapp as the possible killer. But they also say it is now immaterial and irrelevant what Knapp did and how Knapp behaved, or whether he was a prescription drug addict, or whether he owed people money, or whether he was in desperate financial state, or all of the other testimony that we were going to begin yesterday to build up toward the admission through Schmidt, the investigator, of the anonymous e-mail. Their position is because that third party defense is no longer available, then that story will never get told.

The prejudice is that we have now been put in the position, I think unfairly, of assuming that we had a ruling in place, the June 3rd ruling permitting this defense to begin to tell the story in the way in which we chose to do that. Remember, we are doing this in cross-examination in the State's case. We are not presenting our case yet. That is when the anonymous e-mail will come forward. It will come forward in our case. We have to lay the ground work. The jury has to understand who Knapp was and why the State looked away.

The relationship and the prejudice to us is that we want to argue that their failure to investigate Knapp was, as we said, another example of their myopic and tunnel vision focus only on Mr. DeMocker. The prejudice right this moment is that we have now begun to tell the story, and it was abruptly cut off in front of the jury in a way that was totally unexpected to me. I did not anticipate that objection, and I did not anticipate the Court sustaining those objections yesterday, because we had in place, at least in my mind, a ruling.

I understand that the Court had questions about the ruling, but it had not been changed. I thought it was utterly appropriate to cross-examine the State's witness about those particular facts, which were no surprise to the State, and which are part of the foundation for the story that comes in through the anonymous e-mail.

Shutting us off now leaves the jury wondering why Knapp is even involved in this case. Why is the defense mentioning Knapp? Why did these people come on and testify yesterday? What is that about? And if the State has its way in this point, that will be the end of the discussion of Knapp. The State will jump up every time some mention of Knapp is made. Some witness talks about Knapp, and they will say the third party defense doesn't apply and Knapp has an alibi. Shut this down right now.

We acted in good faith on the June 3rd ruling from Judge Lindberg, which we agree with you is a final ruling. It was the State that argued it wasn't a final ruling in this case, and the State argued that 16.1(d) did not apply.

If nothing more is allowed, then we have been put in the -- it is not even an uncomfortable position. It is an unfair and highly prejudicial position of beginning to tell the story of Knapp that will have no conclusion.

THE COURT: Mr. Sears, just looking at your response, which you put it to me, I think, as the final ruling by Judge Lindberg is this: The State asked the Court to reconsider the motion the same day, and the Court reiterated that the ruling stands, but that the Court would consider it. That is what I was presented with all the way to August 27th of where we stood in that uncertain state.

Mr. Butner, only on the prejudice issue.

MR. BUTNER: Judge, to clarify, first of all, Knapp was interviewed when he pulled up and his vehicle was searched at that point in time. There is testimony in the record about that already.

Secondly, there is no demonstrable prejudice here, and the State is not going to object at every opportunity concerning third party culpability evidence. That is not what is going on here. What is going on here is

that we have one piece of evidence that is clearly highly unreliable, highly speculative, and invites confusion by the jury with no way to further investigate it. It is just out there. It came from anonymous anonymous. It does not meet any standards of reliability. It does not violate the Sixth Amendment because it is clearly so speculative. It could be manufactured evidence of the worst kind, Judge, with no way to test it. That is why it is unfairly prejudicial to the State and not to the defense.

It has nothing to do with them being able to present evidence of third party culpability. They can do that at every step along the way, and we would fully expect that to happen.

MR. SEARS: May I add one sentence, Your Honor?

Taking away the constitutionally grounded defense from a defendant in the middle of a murder trial could well be reversible error and would seem to be prejudice, per se.

We are in the middle of a lengthy trial. We operated under a defense. We began to build the case for that defense. It is now, as the Court's ruling stands, taken away from the defendant. That is terribly concerning, and I think raises a constitutional issue in this case for this defendant.

THE COURT: You made a record on that, Mr. Sears.

MR. SEARS: Thank you, Your Honor.

THE COURT: I don't see the confusion is any aspect of this. One of the factors in Rule 403, and it is not confusing at all, if the anonymous e-mail is reliable, it is something the defense could point to as showing third party culpability. So I don't understand confusing or misleading the jury. To me, it is just reliability.

At this point I am not permitting the anonymous e-mail. The prejudice issue is something I have to consider very carefully, and I have to consider that in light of all the other things that have happened in this trial, as well, I think; the timing, and why things happened when they did.

Okay. That's where the ruling stands now, though. I want that clear. The anonymous e-mail is not permitted at this time. I am going to consider the prejudice issue. So if there are witnesses that come up today or this week that have that potential for getting into that, that's just how it is going to be at this point.

(Whereupon, these partial proceedings were concluded.)

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C E R T I F I C A T E

I, ROXANNE E. TARN, CR, a Certified Reporter in the State of Arizona, do hereby certify that the foregoing pages 1 - 22 constitute a full, true, and accurate transcript of the proceedings had in the foregoing matter, all done to the best of my skill and ability.

SIGNED and dated this 12th day of September, 2010.

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ROXANNE E. TARN, CR
Certified Reporter
Certificate No. 50808